Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1547

**D. DWAYNE SHAUFLER,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*May it please the Court:*

Petitioner D. Dwayne Shaufler prays that this Court's Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, for review of the judgment of that Court entered pursuant to the opinion presented as Appendix A to this Petition.

## REFERENCE TO REPORTS

The opinions delivered in the courts below have not been reported in any official or unofficial reporter system.

The Opinion of the Court of Appeals is reprinted as Appendix A. The order denying rehearing is reprinted as Appendix B. The trial court delivered no written opinion, but the colloquy leading to entry of judgment, in which the reasons for the judgment are expressed by the trial judge, is reprinted as Appendix C.

## STATEMENT OF GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

(i) The opinion of the Court of Appeals was rendered on February 1, 1980. Mandate was issued on March 19, 1980.

(ii) A Petition for Rehearing was timely filed, and was denied on March 4, 1980. No order extending the time for filing this Petition has been requested or granted.

(iii) Jurisdiction is conferred upon this Court by Title 28, United States Code, § 1254(1).



## QUESTIONS PRESENTED FOR REVIEW

1. May a conviction for fraud be affirmed on a factual and legal theory totally different from that upon which the trial court's judgment of conviction was grounded, and which was never alleged or argued by the prosecution at any stage of the trial or appellate proceedings?

2. In this case, the indictment alleged that a loan application was fraudulent because it "materially failed to disclose liabilities, and the net worth claimed by (defendant) was materially less than as listed."

   (a) Can that indictment be proved by evidence which fails to show that the defendant's net worth is less than the net worth figure recited in the loan application?

   (b) Where a financial statement recites the net value of a partnership interest, itemizing neither assets nor liabilities, are the liabilities "undisclosed" for purposes of the statutes denouncing criminal fraud?

   (c) Is a failure to itemize liabilities a material misrepresentation, where no special relevance is shown; and where the loan application correctly states the declarant's net worth?

   (d) Can a loan application be criminally fraudulent if it contains no falsehood?

3. Where all the evidence is submitted by stipulation in a manner analogous to civil summary judgment procedure, so that the trial court observes no witness and resolves no factual dispute, must the evidence be viewed on appeal in the light most favorable to the appellee?

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

(i) The Petitioner was charged with violation of Title 18, United States Code, § 1014, which provides in relevant part as follows:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance . . . or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

(ii) In this Court, Petitioner places substantial reliance upon the following provision of the Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . .

(iii) Petitioner also relies upon the grand jury clause of the Fifth Amendment to the Constitution of the United States, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .



## STATEMENT OF THE CASE

Petitioner was charged with fourteen counts of uttering false financial statements to federally-insured banks, in violation of Title 18 U.S. Code § 1014. Six counts were dismissed on motion of the government, and judgment of conviction entered on the remaining eight charges.

No witnesses were called at the trial. The evidence was presented through a thirty-page written stipulation of facts (Record Item 8) and some 90 exhibits consisting primarily in financial statements and ledgers.

Each of the questioned transactions arose from the operation of a business known as Antioch Investments (Stipulation, p. 30). Antioch was a business partnership between Petitioner and one Walter Koziol and was engaged in a number of varied enterprises (Stipulation, p. 9). A representative listing of its business enterprises includes an industrial concern in New Berlin, Wisconsin; an aluminum business in Bristol, Wisconsin; a maintenance contracting business in New Orleans (Stipulation, p. 12); a machine tool company (Stipulation, p. 15); a laboratory (Stipulation, p. 19); and sundry real estate (Stipulation, p. 4, 7).

Koziol was a man of very substantial wealth. As of the end of 1972 his assets included common stock of Beatrice Foods Corporation valued in excess of six and one-half million dollars, and his net worth was represented at more than eighteen million dollars (Govt. Ex. 7-03).

By the end of 1972 the Antioch operation had become quite extensive. Koziol and Petitioner each valued his

respective interest in Antioch at more than two and one-half million dollars (Govt. Ex. 7-02, 7-03).

The Antioch operations continued at a brisk pace throughout 1973. The activities were substantially financed through a series of bank loans. The stated borrower was generally the specific Antioch subsidiary for whom the money was needed, with Petitioner and Koziol acting as personal guarantors of repayment (see, e.g., Stipulation, pp. 12, 15, 19).

The indictment is based upon a series of bank loans negotiated from about July of 1973 to February of 1974 at a dozen different banks in northern Illinois and southern Wisconsin in the course of the Antioch Investments operation. It is charged that in connection with these loans, the Petitioner submitted materially false financial statements, in that the statements failed to disclose certain liabilities.

### The Financial Statements

Personal financial statements were submitted to the lenders by both Petitioner and Koziol. The "minimum net worth" of each borrower as shown by the statements varies substantially from time to time, and the net worth of Koziol is consistently shown to be substantially greater than that of Petitioner.

Each of the financial statements was submitted as a disclosure of the "minimum net worth" of the declarant. With the passage of time, the statements showed broad fluctuation in the value assigned to Antioch Investments, and corresponding variations in each declarant's "minimum net worth". Petitioner's financial statement submitted to Parkway Bank as of December 31, 1972 shows "Antioch Investments, for purposes of this state-



ment carried at minimum value" as a $750,000 asset. The statement accordingly showed a "minimum net worth" of slightly more than $925,000. (Govt. Ex. 14-06). Petitioner's financial statement dated December 15, 1972 submitted to Grafton State Bank shows "Antioch Investments and related interests carried at replacement or fair market value" as an asset of approximately 2.6 million dollars, resulting in a "minimum net worth" of about three million dollars. (Govt. Ex. 7-02)

In all cases, the financial statements facially recited a disclosure of the "minimum" that the declarant could be said to be worth.

Each of the financial statements of Petitioner and Koziol lists the respective declarant's interest in Antioch Investments as an asset. The pairs of statements submitted to each of the lending banks generally contain identical entries reflecting the value then assigned to each declarant's interest in Antioch Investments. In some cases, each declarant's statement identifies the other as his partner in Antioch, both having one-half interests.

Every financial statement submitted by each declarant contains only a single entry reflecting the assigned value of the declarant's interest in Antioch. None of the statements of either declarant makes reference to any specific Antioch asset or liability, nor to the aggregate of Antioch's assets or its liabilities. (No charges were based upon the Koziol statements, and no allegation has been made that those statements are false in any particular. Koziol was never charged with any offense, nor pleaded as an unindicted offender, nor alleged to be guilty of any wrongdoing.)

### The "Undisclosed Liabilities"

The Antioch Investments liabilities varied from time to time, but amounted at peak to more than seven million dollars.

The largest liabilities were two debts, each in the amount of 2.4 million dollars. One of these, owed to Continental Bank of Milwaukee, was paid during December of 1973. The other, owed to First National Bank of Chicago, was retired by the sale of Beatrice Foods stock owned by Koziol and pledged as security for that loan. (Stipulation, pp. 10, 11)

Other Antioch debts, none of which was itemized in any of the financial statements submitted to any bank by either partner, ranged in amount from $15,000 to $200,000 at various times. Each count of the indictment pleads at least twelve such undisclosed debts, the amount and number varying from time to time.

At trial, the government stipulated that without exception, each of the loans was obtained "to financially assist (Petitioner) and Walter Koziol in the operation of the various business enterprises d/b/a (sic) and referred to as Antioch Investments." (Trial Stipulation, p. 30) That purpose was generally disclosed to the lenders when the loans were negotiated (Trial Stipulation, pp. 4, 9, 11, 12, 15, 19, 24, 25, 26). Each of the Antioch partners assumed personal liability for repayment of the loans, either as primary obligors or as guarantors. (Stipulation, pp. 6, 7, 12, 13, 15, 19, 22, 24, 25, 26)

### The Failure Of Antioch

The record infers that the Antioch operation collapsed, although there is no direct evidence to that effect.



The government tendered proof, which the Court refused, that Koziol filed a bankruptcy petition in April of 1974 (Tr. 4-6-79, p. 5). As previously noted, the parties stipulated that First National of Chicago achieved payment of the 2.4 million dollar indebtedness due it by selling the collateral pledged to it (Trial Stipulation, p. 10). Although the record is silent as to whether most of the bank loans were repaid, it seems clear that the largest debts were repaid (Stipulation, pp. 10, 11, 22; Exhibit 12-01, p. 3), but some of the smaller ones were not. (Stipulation, pp. 4, 13, 15).

The record contains no showing of the reason for the failure of the Antioch operation.

### The Trial Theories Of The Government

A. THE PROSECUTION CONTENDED THAT THE "UNDISCLOSED DEBTS" WERE OBLIGATIONS OF THE "ANTIOCH INVESTMENTS" PARTNERSHIP.

The government claimed quite unequivocally that the debts which were not itemized on the loan applications, were obligations of the "Antioch Investments" partnership.

So undeviating was the government's adherence to that theory, that the prosecution dismissed four counts of the indictment because the financial statements involved in those counts contained a reference to "the fair market value over and above any and all indebtedness of Antioch Investments, a co-partnership of Walter Koziol and (Petitioner) . . ." The government advised the trial court that such a reference to the "indebtedness of Antioch Investments" was, although "oblique" and "limited", a sufficient disclosure of "the liability which is the focus of the government's case" to preclude criminal liability on the part of the declarant. (Government Trial Memorandum, pp. 4, 5)

(We note at this juncture that the conviction was affirmed because the Court of Appeals concluded that the unitemized obligations were *not* debts of Antioch Investments. Thus, the theory of affirmance was the precise converse of the theory which produced Petitioner's conviction in the trial court.)

B. The "Internal Inconsistency" Theory.

The government argued that Petitioner had claimed a net worth of slightly less than one-half million dollars as of July 15, 1972. In August of 1973, slightly more than a year later, he claimed a net worth exceeding seven million dollars. (Govt. Ex. 13-05) The government argued that such an appreciation in net worth was "inherently incredible". (Government Trial Memorandum, Record Item 7, p. 15; Tr. 4-6-79, pp. 41-42).

The Petitioner responded that he had furnished only "minimum net worth" statements. Thus, he had never stated that he was worth *only* one-half million dollars in April of 1972; instead, he had claimed that he was worth *at least* a half million dollars, which is not inconsistent with a claim of seven million dollars' net worth a year later. He further pointed out that he had expressly advised one of the banks that his financial statement did not disclose his total worth. (Defense Memorandum, Record Item 9, pp. 2-3, 11-12).

C. The Dollar Volume Of The Antioch Debts.

The government argued that the sheer gross dollar amount of Petitioner's liabilities is in itself proof of fraudulent intent, because it was unreasonable not to have disclosed such large debts. (G. Memo, pp. 2, 3, 12)



The Petitioner responded that the Antioch resource had been disclosed at its net value (D. Memo, pp. 3, 4) and that the amounts given had been the values in excess of the obligations to which the government refers (Tr. 4-6-79, pp. 65-69). He argued that there was no evidence showing that his net worth was any less than claimed by him in his several financial statements (D. Memo, p. 13; Tr. 4-6-79, p. 67).

D. The Value Of "Antioch Investments".

In response to Petitioner's "net worth" argument, the government attempted to reopen proofs to show that Petitioner had overvalued his interest in Antioch Investments. That motion was denied because, *inter alia*, such a contention would have represented a fatal variance: The indictment alleged that Petitioner had understated his liabilities, so that proof of overstatement of assets was excluded as irrelevant to the charge. (Tr. 4-6-79, pp. 16, 35)

At this stage, the government repeated its view that the defendant had been charged with overstating his net worth. The significance of the unitemized liabilities, in the government's expressed view, was that "if he failed to disclose liabilities, accordingly that would certainly affect the bottom line." (Tr. 4-6-79, p. 16)

**The Trial Court Decision**

The trial court accepted the government's arguments. The judge held that undisclosed liabilities would necessarily result in a reduction of stated net worth, and that any contrary contention is "a ridiculous position" (App. pp. 10a, 14a).

The defendant was sentenced to a one-year term of imprisonment on each count, to run concurrently.

### The Appellate Theories Of The Parties

Petitioner appealed his conviction to the Court of Appeals, arguing that there had been a total failure of proof because his net worth had not been shown to be less than claimed by him on his loan applications. Essentially, he contended that the valuation ascribed to Antioch Investments had been stated as a "net" figure which took account of the debts which the government claimed were undisclosed. (Appellant's Brief, pp. 12-20) He also argued that if the government had proved any offense, it was an overvaluation of Petitioner's interest in Antioch, which would constitute a fatal variance from the indictment, which had charged an understatement of liabilities. (*Id.*, pp. 20-24)

In response, the government argued that it had proved that Petitioner "failed to disclose liabilities and accordingly, the net worth claimed was materially less than as listed."[1] (G. Br. 20, 25) The government stated its position to the Court of Appeals in the following terms:

[1] Although the status of Antioch Investments as a partnership of Petitioner and Koziol had been conceded throughout the trial stage, the government also argued on appeal that there had been no showing that Antioch was a partnership, or that Petitioner had any interest in that partnership. (G. Br. 22-23) In reply, Petitioner quoted the prosecutor's references to Petitioner as Koziol's "partner" in the "Antioch Investments" business before both the trial and the appellate courts; the trial stipulation reciting that Koziol and Petitioner were partners in Antioch; and the government trial exhibits which make the same assertion. (Reply Br. 3, 4) The Court of Appeals' opinion proceeds on the premise that Antioch was a partnership in which Petitioner had a partner's interest. (App. 3a, 5a)



> ". . . (Petitioner) fraudulently failed to disclose liabilities, as alleged in the indictment. It then follows as a reasonable inference that as a result the net worth claimed must be readjudged to reflect and account for the existing liabilities, and that the net worth was in fact materially less than claimed." (G. Br. 23)

### The Court Of Appeals Decision

The conviction was affirmed on the theory that Petitioner's net worth was irrelevant, so that it did not matter whether he had overstated his net worth. It was held that even if the unlisted debts were reflected on Petitioner's financial statement as a reduction in the value of the "Antioch Investments" asset, the debts should not have been entered on the statement in that manner because they were not, "in form", partnership liabilities. (App. 3a) Since the loans "were purely personal in form", they could not be shown on the financial statement by "netting or offsetting such liabilities against assets of the (partnership)." (App. 3a)

## STATE COURT PROCEEDINGS

The case does not involve any proceeding in any state court.

## BASIS FOR FEDERAL JURISDICTION

The proceedings below commenced with an indictment returned by a federal grand jury, charging violation of a federal statute. The District Court's original jurisdiction was conferred by Title 28, United States Code, § 1355.

## ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

### 1. The Shifting Theory of Guilt.

The Court of Appeals affirmed a vastly different conviction from that imposed by the trial court.

Petitioner's situation would have been improved if he had been allowed to trade places with the protagonist of Kafka's *Trial*. The nature of the accusation was withheld from Kafka's defendant with relative forthrightness. Petitioner, on the other hand, was effectively deceived. He was furnished an ostensible specification of the accusation; refuted that accusation at trial; and then was informed, on appeal, that he had defended against the wrong charge.

It is beyond cavil that the Petitioner originally was accused of misrepresenting his net worth by submitting financial statements which made no allowance for his debts. The indictment said so; the prosecutor urged that theory to the trial court; the trial judge relied on that theory in finding him guilty; and the prosecutor reiterated that theory before the Court of Appeals.

It was not until the Court of Appeals rendered its opinion, that Petitioner learned that he had been accused, all along, of something different from the charge over which the parties had been arguing up to that time. The change of the accusation had imparted a retroactive irrelevance to his defense: Perhaps it was true, just as he had argued, that he had not overstated his net worth, but he was "guilty" of using an unacceptable accounting system in computing that net worth.



In the ensuing portion of this argument, we urge that Petitioner's accounting system was completely correct. For present purposes, however, we point out that Petitioner has been denied a trial on the issue which the Court of Appeals decided.

The trial court theory of guilt simply cannot be reconciled with the appellate theory of affirmance. The two are not merely different; they are hopelessly incompatible. We demonstrate:

In the trial court, the government dismissed four counts because the relevant financial statements had disclosed that debts, in general terms, were owed by Antioch Investments. Those debts were not itemized, nor were any details furnished, but the government fairly conceded that *any* reference to debts of Antioch Investments was sufficient to preclude criminal responsibility because it amounted to a disclosure of "the liability which is the focus of the government's case," in the prosecutor's words. (Government trial memorandum, p. 5) In the Court of Appeals, however, Petitioner's conviction was affirmed on the totally antithetical premise that it was *fraudulent* to have treated those same liabilities as Antioch debts.

In short: the same facts which were viewed in the trial court as a defense to the charge, were treated by the Court of Appeals as proof of the charge. That, because the Court of Appeals placed upon the indictment an interpretation so radically different from that adopted in the trial court, that the accusation considered on appeal was functionally a different charge from that upon which the trial court had proceeded.

It is hard to imagine a more serious denial of "constitutional due process in sustaining the trial court by

treating the conviction as a conviction upon a charge not made." *Eaton v. City of Tulsa*, 415 U.S. 697, 699 (1974). For all practical effect, Petitioner was denied notice of the accusation and the right to defend himself against a specified charge, and his plight is functionally indistinguishable from that of a person convicted of a charge on which he was never tried. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

**2. The Plastic Charge Of Falsity.**

Section 1014 of Title 18, under which Petitioner was charged, employs generic language typical of criminal sanctions denouncing misrepresentation. At best, such charges tread the border of the guarantees of the Fifth and Sixth Amendments.

The Fifth Amendment confers the right to respond only to the specific charges preferred by a grand jury. *Stirone v. United States*, 361 U.S. 212, 217 (1960). The Sixth Amendment requires that an indictment "apprise the defendant with reasonable certainty of the accusation against him," *Russell v. United States*, 369 U.S. 749, 765 (1963) in order that he may intelligently formulate his defense strategy, cf. *Brooks v. Tennessee*, 406 U.S. 605 (1977).

Some courts have held that charges which sound in fraud, require special care to protect the defendant's Sixth Amendment right to notice, so that the indictment must:

> ". . . state with particularity the theory on which it charges (dishonesty) . . . And we think it equally important in such cases that the government be required to prove the theory it has charged." *United States v. Smolar*, 557 F. 2d 13, 19 (1 Cir. 1977).



Other courts have taken a much more indulgent view of the sufficiency of indictments sounding in fraud, noting that Congress has never applied a limiting definition to the generic terms and phrases:

> "The law does not define fraud. It needs no definition. It is as old as falsehood and as versable as human ingenuity." *Weiss v. United States*, 122 F. 2d 675, 681 (5 Cir. 1941).

That approach has caused some courts to view the federal statutes as

> ". . . a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *Gregory v. United States*, 253 F. 2d 104, 109 (5 Cir. 1958); *United States v. Mandel*, 591 F. 2d 1347, 1361 (4 Cir. 1979); *United States v. States*, 488 F. 2d 761, 764 (8 Cir. 1973).

The *States* court offered a succinct summary of the reach of the federal anti-fraud statutes:

> "This is indeed broad." (488 F. 2d at 764)

We do not here contend that the breadth of the statute, standing alone, denies due process. As applied in this case, however, that breadth was used to create a floating charge whose parameters were adjusted retroactively to salvage Petitioner's conviction. The appellate interpretation of the indictment caused the charge to be recast, after trial, in terms so vague that the contrary interpretation given to the indictment by both prosecutors and defense counsel at the trial stage, was disregarded. That type of terminological imprecision "violates the first essential of due process of law," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The fact that it was necessary in this case to direct the guesswork to the interpretation of the indictment, instead of to the underlying statute as in *Connally*, tends

to aggravate rather than to mitigate the constitutional deprivation.

"Men of common intelligence" (*Connally, supra*, 269 U.S. at 391) may or may not have been able to predict that Section 1014 would criminalize the allocation of an indebtedness as a partnership obligation rather than as a personal debt. Almost certainly, however, they would not have been able to guess that the indictment in this case would be interpreted in that manner.

It is one thing to hold that the federal statutes command a high standard of rectitude in one's deportment. It is quite a different thing to contend that the necessity for imposition of the standard is so compelling that the Fifth and Sixth Amendments must give way to accommodate the thrust of those statutes. The breadth of their reach, the wide scope of conduct encompassed within their generic denunciations, requires special care to assure that the charges specify the particulars of the offense, and that the prosecution theory remain consistent throughout the proceedings. Absent such safeguards, the persons accused under those statutes will be forced "to go to trial with the chief issue undefined." *Russell v. United States*, 369 U.S. 749, 766 (1962).

That is exactly what happened to this Petitioner.

### 3. The Supposed Distinction Between The Personal And The Partnership Obligation.

The appellate-level modification of the accusation had several unfortunate consequences.

One such consequence, was that the Court of Appeals decided the case on a point which had not been briefed or argued by either party. The treatment of that point by the Court of Appeals reflects serious errors of law.



The opinion below concedes that the debts allegedly omitted from Petitioner's financial statements, might well have been used to reduce the value of his interest in Antioch Investments, by "netting or offsetting such liabilities against assets of the enterprise." (App. 3a) That action was improper, in the view of the court below, because in signing the promissory notes evidencing the debts, Petitioner did not include language showing "that he was signing as agent of Antioch Investments." The notes, therefore, were held not to be "liabilities of Antioch Investments," (App. 4a) and should have been offset against Petitioner's other assets, instead of being used to reduce the value of his interest in Antioch. (App. 4a)

For that reason, and that reason alone, Petitioner's conviction is affirmed, even though the "bottom line" of Petitioner's financial statements—his net worth—may have been totally accurate.

Even if the Court of Appeals' premise had been correct, we would challenge its conclusion. Such a precise standard of accounting procedure seems a questionable predicate for imposition of criminal liability upon the Petitioner, who is not even an accountant.

More to the point, however, the premise is in serious error. The debts were liabilities of Antioch Investments, clearly so established by the record.

The situs was Wisconsin, where the Uniform Partnership Act has been in effect since 1915. Section 9(2) of that Act provides that authorized acts of a partner are binding on the partnership, even if they were not "apparently for the carrying on of the business of the partnership." W.S.A. 123.06(2).

There can be no question that the signing of the notes was fully "authorized" within the meaning of the Statute. There only two partners: Petitioner and Koziol. The notes were signed by Petitioner, and endorsed by Koziol as guarantor. The loans were requested and used "to financially assist (Petitioner) and Koziol in the operation of . . . Antioch Investments." (Trial Stipulation, p. 30) The borrowers were advised that the loans were sought in furtherance of Antioch business. (Trial Stipulation, pp. 4, 6, 9, 11, 12, 15, 19, 25, 26)

The obligations were clearly Antioch debts, even though Petitioner did not overtly sign as "agent." The cited Statute makes that clear.

It is simply not correct, as the Court of Appeals holds, that debts which are "in form the personal liabilities of (Petitioner)" cannot be debts of Antioch. Nor is the converse true. Pursuant to Section 15(b) of the Uniform Partnership Act, "any partner may enter into a separate obligation to perform a partnership contract." W.S.A. 123.12. The debts, accordingly, are not to be neatly delineated as being either "liabilities of Antioch Investments" or "personal obligations of (Petitioner)", the categories which the Court of Appeals treats as mutually exclusive. (App. 4a) The debts are liabilities of both the partner and the partnership. Indeed, it could not be otherwise. In Wisconsin, as in most states, "a partnership has no entity distinct and apart from the persons who compose it." *Village of Westby v. Bekkedal*, 178 N.W. 451, 454, 172 Wis. 114 (1920).

The debts were properly used to offset and reduce the value of Petitioner's interest in Antioch. We would urge, if necessary, that to account for the debts in that manner could not be treated as a criminal offense, even if the debts were not partnership obligations. The



record, however, clearly shows them to be Antioch liabilities. To criminalize that assertion is an ultimate injustice.

**4. The Unwarranted Deference To The Trial Court's Findings.**

The opinion below is "buttressed" by the doctrine that on appeal, the evidence must be viewed "in the light most favorable to the government." (App. 4a)

That doctrine is derived from this Court's holding in *Glasser v. United States*, 315 U.S. 60, 80 (1942). *Glasser* holds that on review, proper deference must be shown for the evaluation made by the jury concerning the relative credibility of opposing witnesses as observed in the courtroom. The Seventh Circuit *Cardi* rule, cited by the Court below, is identical. *United States v. Cardi*, 478 F. 2d 1362, 1368 (7th Cir. 1973).

It would seem clear beyond argument, however, that the *Glasser-Cardi* doctrine of appellate review is completely inapplicable in cases in which no evidence has been heard and in which the trial court has decided only a question of law. This case was submitted on a stipulation of facts. There were no witnesses to be observed, no contested fact issues to be resolved. No "trier of fact" function was performed in this case.

There simply is no contested evidence in this case. There is nothing to which the *Glasser* doctrine could apply. The doctrine is as inappropriate here, as it would be on review of a summary judgment or judgment entered on the pleadings in a civil case.

Concededly, the judgment below does not turn on that issue. The *Glasser* doctrine is used only to "buttress" the lower court's conclusion. The judgment, however, rests

upon a platform sufficiently precarious that removal of the buttress may well result in a collapse of the structure.

## CONCLUSION

For the foregoing reasons, we pray that this Court issue its Writ of Certiorari to the end that the judgment may be reversed.

Respectfully submitted,

MELVIN B. LEWIS
315 S. Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

*Attorney for Petitioner*



## APPENDIX A

### Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued: November 7, 1979
February 1, 1980.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge*•

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

No. 79-1601 vs.

D. DWAYNE SHAUFLER,

*Defendant-Appellant.*

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79-Cr-9—JOHN W. REYNOLDS, *Judge.*

### ORDER

[Unpublished Order Not To Be Cited Per Circuit Rule 35]

Appellant D. Dwayne Shaufler was convicted of eight counts of making false statements to banks insured by the Federal Deposit Insurance Corporation under 18 U.S.C. § 1014. Each count dealt with one of eight personal financial

• The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

statements which Shaufler submitted to insured banks in order to obtain loans, and alleged that each financial statement "materially failed to disclose liabilities" in violation of Section 1014. In addition, certain counts alleged that Shaufler's net worth was materially less than the net worth indicated on the financial statements in violation of Section 1014.

On appeal Shaufler raises only two issues. He argues that the undisclosed liabilities were actually those of a "partnership" known as "Antioch Investments" and were not personal liabilities which must be separately disclosed on a personal financial statement. He also contends that the Government did not prove that his net worth was less than that shown on the financial statements. We find that for each of the eight financial statements there were substantial undisclosed liabilities which were purely personal in form. We, therefore, affirm his conviction on all eight counts. We do not find it necessary to decide whether his conviction on some of these counts might also be upheld on the basis that the financial statements understated Shaufler's net worth.

I.

The essential elements of a Section 1014 violation are as follows: (1) the making of a false statement or report upon any application, commitment or loan; (2) knowing the same to be false; (3) for the purpose of influencing in any way the action of; (4) a federally insured bank. *United States v. Kernodle,* 367 F.Supp. 844, 851-852 (M.D. N.C. 1973), *aff'd,* 506 F.2d 1398 (4th Cir. 1974). The failure to disclose personal loans in a personal financial statement under such circumstances is a violation of Section 1014. *See United States v. Goberman,* 458 F.2d 226 (3rd Cir. 1972).

A bench trial was held in the instant case, and the parties agreed to thirty pages of stipulations incorporating eighty-eight exhibits. Neither side called any witnesses, so these stipulations and exhibits constitute the entire rec-



ord. Each of the financial statements in question listed "Antioch Investments" as an asset. It was variously described as "Antioch Investments and related interests carried at replacement or fair market value" or "Antioch Investments, a co-partnership, and related business interests, carried at cost and replacement." Sometimes the single word "net" was added to the end of each of these descriptions. It was stipulated that the purpose of each of the undisclosed loans "was to financially assist D. Dwayne Shaufler and Walter Koziol in the operation of the various business enterprises d/b/a and known and referred to as Antioch Investments."

Shaufler claims that he offset the value of these loans against the value of his interest in "Antioch Investments" and disclosed this "net" figure on his personal financial statements. He argues that this method of accounting adequately disclosed the liabilities and therefore did not violate Section 1014 because it is proper to offset assets and liabilities of a sole proprietorship, a partnership or a closely held corporation and give only one figure as the value of the investment. He cited the American Institute of Certified Public Accountants' pamphlet on Audits of Personal Financial Statements in support of this method of disclosure.

We reject defendant's argument because, for the purposes relevant here, the method of accounting and disclosure he advocates might be appropriate only if the liabilities which were offset against assets of a partnership or other such entity were, in form, liabilities of that entity. On the other hand, debts for which an individual is primarily liable as an individual are not adequately disclosed for the purposes of Section 1014 if they are merely offset against the assets of one of that individual's investments, as was allegedly the case here. The fact that the money Shaufler obtained by taking out loans, which were purely personal in form, was used to assist him in the operation of a business enterprise does not, for purposes of Section 1014, convert the loans into liabilities of that business en-

terprise and allow netting or offsetting such liabilities against assets of the enterprise.

It was stipulated that some of the notes in question were signed by Shaufler, and copies of most of these notes were introduced as exhibits. These notes do not mention "Antioch Investments," or any other entity or enterprise, or show that Shaufler might have thought he was signing as an agent of "Antioch Investments."[1] We conclude that there was sufficient evidence to prove beyond a reasonable doubt that the notes were personal obligations of Shaufler, as to which he was primarily liable and as to which separate disclosure was required. This conclusion is buttressed by the fact that, in reviewing the sufficiency of the evidence upon which a defendant is convicted, we must view it in the light most favorable to the Government. *United States v. Cardi,* 478 F.2d 1362, 1368 (7th Cir. 1973).

These loans were in form the personal liabilities of Shaufler and, for purposes of disclosure, may not be offset against the value of "Antioch Investments" without violating Section 1014 even if the money were invested in "Antioch Investments." Since at least one personal loan was outstanding and undisclosed when each personal financial statement was made, each statement was a "false statement" and a violation of Section 1014. Shaufler's conviction on all eight counts is, therefore, affirmed.

II.

Although there is sufficient evidence of Shaufler's undisclosed personal obligations to uphold his conviction on each count, we refrain from expressing any view as to whether *all* the loans listed in the indictment were required to be disclosed on Shaufler's financial statements. More specifically, several of the loans were signed by Shaufler

[1] Some of the notes listed "Antioch Investments" as a mailing address but this did not convert the notes into liabilities of "Antioch Investments."



in his capacity as president of a corporation, but the corporation was the maker of the note. Conceivably, the corporation was part of "Antioch Investments," and its debts might have been netted against the assets of that entity. Shaufler typically personally guaranteed the obligations of these corporations, but he was not primarily liable.

Section 1014 prohibits the making of "false statements" to an insured bank, but obviously, the term "false" requires careful construction within a particular factual setting. In accordance with the general principle that criminal statutes are to be strictly construed, we refrain from expressing any view whether, without some other evidence of falsity under the peculiar circumstances of this case, failure to disclose the secondary obligation of a guarantor is a violation of Section 1014 if the liability in question were, for purposes of disclosure, netted against the assets of an alleged business entity—in this case "Antioch Investments."[2] It is unnecessary to decide this question since each count of the indictment is supported by nondisclosure of purely "personal" liabilities.

Under circumstances other than those presented here (where certain liabilities have allegedly been offset or netted against the assets of a business enterprise and a net investment is shown), there might be no doubt that failure to list obligations subject to a personal guaranty would result in a "false statement" under Section 1014. Under the instant circumstances, however, we find it unnecessary to make such a determination.

Therefore, the judgment of conviction will be affirmed.

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[2] We assume without finding that liabilities which were the subject of personal guarantees were properly offset against the assets of "Antioch Investments," and this is reflected in the value assigned to the investment in that entity.

## APPENDIX B

### Order Denying Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 4, 1980.

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge*•

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

No. 79-1601 vs.

D. DWAYNE SHAUFLER,
*Defendant-Appellant.*

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 79-Cr-9—JOHN W. REYNOLDS, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Defendant D. Dwayne Shaufler, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

• The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.



## APPENDIX C

### Trial Court Decision

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
*Plaintiff,*

No. 79-CR-9 vs.

D. DWAYNE SHAUFLER,
*Defendant.*

Page of Transcript

1 TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings in the above-entitled matter, before the Honorable John W. Reynolds, Judge of said Court, April 6, 1979.

Appearances
Thomas E. Martin and Mark S. Gempeler,
Assistant United States Attorneys,
appearing for the Plaintiff.
Thomas P. Doherty and Gregory Gramling, Jr.,
appearing for the Defendant.

• • •

57 The Court: Mr. Gramling or Mr. Doherty, whoever wishes to talk.

Mr. Gramling: I would call the Court's attention to each count of the indictment where the language in the whereas or summary paragraph is substantially the same. It alleges that a particular financial state-
58 ment materially failed to disclose liabilities. That's element number one. And the net worth claimed by

Shaufler was materially less than listed, that's element two.

It doesn't say by reason of the failure to disclose liabilities. Otherwise we would have a completely different theory of this case.

The stipulation and the exhibits indicate that Mr. Shaufler presented a series of financial statements to various different banks claiming various minimum net worths. At no point in the stipulation or in the exhibits is there any evidence to show that Mr. Shaufler's net worth as shown on any single financial statement was less than what he claimed.

The Court: Wait.

Mr. Gramling: There is no—

The Court: But it is agreed that he did not list all his liabilities.

Mr. Gramling: That's correct.

The Court: And your point is that your net worth can be greater when you fail to list liabilities than when you list them?

Mr. Gramling: Well, failure to list, Your Honor, is not the same thing as failure—as not taking them into account in arriving at net worth.

The Court: True.

59 Mr. Gramling: The fact that you don't itemize them does not mean that you haven't taken them into account when you represent to a bank that my net worth is such and such.

The Court: Okay, but how do you deal with the problem when you list some liabilities but you don't list the others?

Mr. Gramling: I know of no law or regulation, Your Honor, that compels a person to list all of his liabilities.

The Court: You're not compelled to borrow money. That's not the question. If you do list in net worth statements—all right. I understand your position.

Mr. Gramling: But he gave a financial statement. As I pointed out to the Court before, there is no hard



and fast rule either of law or regulation that prescribes the form of a financial statement.

It is our position that these statements have to be read for what they purport to show, what he is actually representing to the bank. What he is representing, No. 1, is that Antioch Investments has a minimum net worth or a carrying value or a net net worth of X million dollars.

Moreover, he is representing that he himself has a minimum net net worth of X thousand or million dollars. And unless the government can establish from

60 the record that that is not true, it's our argument that they failed in their burden of proof.

No. 2, there is a question of intent. With respect to Count 1, which Mr. Doherty pointed out, we feel it's most compelling that at the time when he had a liability of over $2 million to the Marine Bank, he is referring the Amalgamated Bank to the Marine Bank as a reference for the purpose of having his financial representations verified.

And the Amalgamated Bank checks with the three references that Shaufler has given them, including the Marine Bank to whom he then is liable together with Koziol for over $2 million and verifies to its own satisfaction that he has a net worth of five and a half million dollars.

That's a government exhibit. Those are matters that the government has produced here and offered in evidence before the Court. And I'm referring again to Exhibits 1-05 and 1-06. It is submitted that that is most compelling on the subject of intent.

The statements that were submitted by Shaufler do not purport to be a complete listing of all of his assets, particularly when there is lumped together Antioch Investments and related business interests.

And it is submitted to the Court that it is most inferential from not specifically listing each asset that

61 went to make up Antioch Investments that Mr. Shaufler in good faith did not feel it necessary to specifically

list each and every liability against those particular assets even though he was personally liable for them by way of guarantee, and that that is what he meant when on his financial statements he says Antioch Investments, net. It has to mean something.

If his net worth, which is verified in the government's own exhibit at one point in April of 1973 to have been five and a half million dollars, is not shown to be less than that, and there is no proof before the Court that it ever was, then it is submitted that the government has failed to meet the proof with respect to the second element that's alleged in the indictment, that he essentially understated his net worth.

The failure to specifically itemize liabilities on the financial statement as long as they are accounted for would not be a material omission. On the bottom line, if his claim of net worth is accurate—

The Court: Where were these seven and a half million dollars worth of liabilities accounted for in Count 1? You stipulated they're not disclosed on the financial statement.

Mr. Gramling: They are not specifically listed.

The Court: They aren't listed at all.

62 Mr. Gramling: That's correct.

The Court: And they amount to over seven and a half million dollars.

Mr. Gramling: Yes.

The Court: He said his total liabilities were $46,000 when, in fact, they were over seven and a half million. How do we handle that?

Mr. Gramling: Again, Your Honor, I refer you to that part of the stipulation which recites that the purpose of all of these loans was they were Antioch Investments' loans.

The Court: That's not the question. The question is was he liable. And you stipulated that he was liable for over seven and a half million, and he listed liabilities of $46,000. Now, how do you handle that?



I mean, you see, Mr. Gramling, I want every human being to think they get a fair trial in this court, and that's why I ask the question. I think that such an explanation is incredible, you know. And so if I think it's incredible, I want you to have the benefit of knowing that because maybe I'm not getting your point.

But the fact is that liabilities are always firm in value, and assets will fluctuate in value. But when you owe seven and a half million, you owe seven and a half million. You're liable for it.

63 Now, your assets can fluctuate based upon market value and a lot of—and inflation and a lot of other things, but your liabilities don't fluctuate.

Mr. Gramling: I suppose what I'm saying to you, Judge, is that what Shaufler did was to take partnership assets over partnership liabilities and show that as a net—

The Court: I don't care what he did. But he said his liability—I mean maybe he thought he was doing it. He hasn't taken the stand or anything.

Mr. Gramling: I understand.

The Court: But the fact is on this statement, we all agree it's accurate, his liabilities are over seven and a half million and he said he's only liable for $46,000.

Mr. Gramling: Granting that, but there's nothing in the record to show his net worth wasn't five and a half million dollars.

The Court: All right, but that isn't the question. He essentially falsified his net worth because he owed seven and a half million that he didn't say he owed. And the issue isn't what his net worth is. The issue is whether or not he falsified it. Isn't that what he's charged with doing?

Mr. Gramling: He is charged with both, Your Honor. He is charged in this indictment with failing to

64 disclose liabilities and understating his net worth.

The Court: And your point is that when he failed to list the seven and a half million, that did not understate his net worth?

Mr. Gramling: There is no proof that it did. That's correct.

The Court: All right. That's what your argument is.

Mr. Gramling: That's exactly our position in a nut shell.

The Court: All right. I understand your position.

Mr. Gramling: Your Honor, please, I direct your attention to exhibit 14-05.

The Court: Which relates to count what?

Mr. Gramling: That would relate to Count 14, I believe.

Mr. Martin: 14-05?

Mr. Gramling: 14-05 is the exhibit that I'm directing the Court's attention to.

The Court: Yes, sir.

Mr. Gramling: Which is a financial statement of Koziol's.

The Court: Walter—

Mr. Gramling: That's not the one I want. I refer the Court to 14-04.

65 The Court: Yes, sir. I have it in front of me.

Mr. Gramling: It bears the legend that the fair market value over and above any and all indebtedness of Antioch Investments, a co-partnership, is currently estimated to exceed five million, one-half to each, $2,527,000. That's the way Shaufler treated in his financial statement the listing of Antioch Investments.

The Court: How did he handle this, if I add it up here, $5 million worth of liabilities that he did not disclose at that time?

Mr. Gramling: Calling your attention—

The Court: In fact, it's $6 million. Pages 37, 38, 39 of Exhibit 20.

Mr. Gramling: He handled it, looking at the top again, 10-04, Antioch Investments, a co-partnership and related business interests, carried at cost of replacement net $1 million.

He's saying on the bottom that the assets of Antioch Investments are worth $5 million more than their liabilities and that his interest being one-half is really worth two and a half million dollars.



That's why I say while there is no specific listing of the liabilities, there is not a failure to account for them in his arriving at a representation of what his minimum net worth was.

66 The liabilities that he listed were his own personal liabilities, not the partnership liabilities. The stipulation recites that all of the loans referred to in Counts 1 through 14 were made for the partnership. Exhibit 14-04 is indicative of how he accounted for those liabilities in arriving at a net worth of Antioch Investments, his—

The Court: You can argue that, but what evidence is there to say that?

Mr. Gramling: That's what he did. He says that on the exhibit. That's his representation.

The Court: You can argue that, but the fact is everyone has stipulated that he had personal liabilities in this instance at that time of something like—undisclosed liabilities of what did it come to, I just added them up, $6 million, over $6 million.

Mr. Gramling: And those are the $6 million—

The Court: They're his liabilities. It doesn't make any difference whose—he had them and he didn't list them. Your point is—

Mr. Gramling: It's not a crime not to list liabilities, Judge.

The Court: It is when—

Mr. Gramling: Only when it results in understating your net worth.

67 The Court: That's correct. And you're arguing that you—well—

Mr. Gramling: I'm arguing that there is no evidence that he ever understated his net worth.

The Court: He stipulated he did. Your point is you can have liabilities without understating your net worth.

Mr. Gramling: That's correct.

The Court: Okay. I don't accept your point. I never heard of it. You know, it's a ridiculous position.

Mr. Doherty: Your Honor, may I say a few things?

The Court: I just think to come in and argue that, that when you're $7 million in debt to say that you don't have to list it when you list your liabilities and you list them at $64,000, you know, I can't understand that. Go ahead.

Mr. Doherty: Your Honor, may I make this observation: What Mr. Shaufler in effect did in these statements is give the bank what he called a minimum net worth, said I'm worth at least this, as he explained to the one bank that one bank—

The Court: You mean to say if you went to the bank and said, "I'm in debt $7 million but I won't tell you about it," that wouldn't—

68 Mr. Doherty: Just a moment, Your Honor. He carried that what you call personal liability also as a liability of Antioch Investments, and that's what was stipulated to and that's why it is important. Because while he personally guaranteed them, they were also part of the obligations of Antioch Investments, the partnership.

So when he tells a bank that I am taking Antioch Investments at a net on some occasions five and a half million dollars representing 90 percent of the so-called minimum stated net worth, there is no reason to assume that there is necessarily some criminal intent.

All the bank has to say is, "Mr. Shaufler, when you said net and you're taking assets after deducting liabilities, would you please now tell us since you've told us that's what you're doing by netting out, would you now please tell us what those liabilities are?" That would be the simple remedy. But the Court seems to me to be imposing upon Mr. Shaufler a standard—some standard—

The Court: I'm not imposing anything on your client.



Mr. Doherty: You're telling him he should have used a different system of accounting. And since he didn't, he's guilty of criminal intent and being a criminal.

I am saying that really when you analyze what his intent is, and it's only what's in his mind, that, for example, when he sends another bank to a bank, a com-

69 panion bank where he was four million in undisclosed liabilities, you talk to that bank and he'll tell you I'm worth $5 million. How can that be considered to be an intent when he didn't disclose that liability specifically by listing it when he sent the bank right to them?

I just submit to the Court that whether it's shoddy, whether it is inappropriate, it is not criminal. He explained it when he was asked by one bank. He never resisted any efforts by any banks to find out what the liabilities and the assets of Antioch Investments were.

The Court may wonder, and I would, why the bank and bank examiners and trained people in the banking industry didn't ask him. But because they failed to ask him shouldn't make him a criminal. That's our position.

The Court: Does anyone have anything more?

Mr. Martin: Specifically the exhibits that the Court should look at which are the subject of the remaining counts of the indictment would be 1-07, 2-02, and 4-05, 6-07, 9-04, 11-05, 12-02, 13-05.

Simply the reason we put on the case as we did was that we were taking the—directing ourselves to the issue which Mr. Gramling has raised in that what did these financial statements purport to be. And the ones that I just listed all purport to list assets and they purport to list liabilities.

70 The first one, Amalgamated Trust & Savings Bank, has another phrase that is a replacement or fair market value listed after Antioch Investments. We submit that in no way reveals that it is not a net worth.

If you have a house and list it for fair market value, that's fair market value of what you can sell it for in the marketplace or the replacement value which your insurance company tries to get you to insure it for in case it burns down.

But you would separately list your mortgage or separately list your liability if it were a house or any other asset, whether it be a factory, whether it be a business or whatever constitutes Antioch Investments.

So, in no way is it revealed or do those state—or do those statements purport to be anything other than a listing of the assets and the liabilities, the liabilities being enormous and clearly material.

With respect to the Exhibit 14-04 which was before the Court which Mr. Gramling was discussing, the liabilities that are stipulated to be undisclosed at that time accumulate to 6.8 million dollars, which is approximately close to $2 million in excess of those that are revealed on Exhibit 14-04.

Now, Count 14 is a count that's dismissed, but nonetheless $2 million in most people's way of thinking
71 would nonetheless be material.

If the banks acted carelessly or recklessly and failed to follow up on some of these things, I don't think that would come as a surprise to the trier of fact, but it certainly does not negate in any way any intent by the defendant. Thank you.

Mr. Doherty: Judge, may I please just say this: that by the same token where in Amalgamated he listed Antioch Investments at fair market or replacement cost, why then if he had some criminal intent to hide would he later on in other financial statements specifically tell you what he meant by fair market value, to wit: the assets, the remaining assets after deducting the liabilities?

That inconsistency, I submit, should be resolved in favor of the defendant. He's not trying to be deceptive by that practice.



Mr. Martin: Well, precisely on that point—

The Court: I think everyone's made all their points, and I think I have to decide the case unless someone really has something new to bring up.

The Court has—I think it is obvious from our discussions today the Court has thoroughly gone over all the exhibits and has read everything that's been submitted. And the Court is satisfied that the defendant is guilty of filing false and fraudulent and misleading
72 financial statements. I don't know how any court could come to any other conclusion based upon the record that I have before me.

Without going into details, I've gone into them in our discussion, in Count 1 the defendant lists $46,000 in liabilities and he has, in fact, agreed that he has over seven and a half million dollars in liabilities.

In Count 2, he listed $64,000 in liabilities and he has over $5 million, or close to $5 million in liabilities.

In Count 4 he listed $91,000 in liabilities and he, in fact, has over $7 million in liabilities.

In Count 6 he listed $104,000 in liabilities to Fredonia State Bank, and at that time he actually had over $7 million worth of liabilities.

In Count 9 he listed $104,250 on his financial statement that he submitted to the Bank of Jackson, and his liabilities—and he actually did have—there were on that date over $7 million worth of liabilities.

Count 11, the First National Bank of Kenosha, he had $64,000 in liabilities that he listed when in fact he had on that date over $5 million worth of liabilities, if not six million. I guess it's over $6 million worth of liabilities.

73 Count 12, he stated his liabilities amounted to $19,000 to the Marine National Bank of Wisconsin when in fact on that date there were between five and six million dollars worth of liabilities.

In Count 13, Northwestern National Bank, Sioux City, Iowa, he listed his liabilities at $46,500 and when in fact there were at that date on that date that he got that loan over $6 million in liabilities.

In addition to that the evidence indicates that on April 15, 1973, he filed one financial statement stating that his interest in Antioch Investments was worth $750,000, and on the same date he prepared another financial statement stating his interest in Antioch Investments was worth $7,100,000. And on the same date, April 15, he filed another statement indicating his assets in Antioch were $5 million. That's on April 15, 1973.

We get to January 1, 1974. Exhibit 14-04 indicates that his assets on one financial statement in Antioch was listed as a million dollars. Another exhibit, 11-05, also he lists it at a million dollars. We get to November 20, 1973, and on that date he lists his interest in Antioch at $5,254,000.

Throughout all these exhibits you find a pattern of undisclosed liabilities. And people may argue about their net worth. Some people want to base it on the cost of reproduction. Some may base it on market
74 value of their assets. Some may base it on reasonable cost minus depreciation. And those items may fluctuate in the accounting field and the business world.

But one thing does not fluctuate, and that's the value of your liabilities. They're firm. If you owe $7 million, you owe $7 million regardless of what happens to the valuation of your assets.

And he failed to discuss those liabilities, and I think the evidence, no man, no human being with—if he's worth what he claims he's worth could not know that he had liabilities of $7 million.

So, the evidence compels the Court to find the defendant guilty of Counts 1, 2, 4, 6, 9, 11, 12, and 13, and I do find and adjudge him guilty of those counts and order a presentence investigation.

Okay. See you all. The defendant may remain on bond.

(At 5:00 p.m., court was adjourned.)

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Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1547

# In the Supreme Court of the United States

OCTOBER TERM, 1979

D. DWAYNE SHAUFLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-5a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 1, 1980. A petition for rehearing was denied on March 4, 1980 (Pet. App. 6a). The petition for a writ of certiorari was filed on April 3, 1980.

### QUESTION PRESENTED

Whether the court of appeals affirmed petitioner's conviction on a factual theory different from that relied on by the district court.

## STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted on eight counts of knowingly making material misrepresentations to a federally insured bank in connection with a loan application, in violation of 18 U.S.C. 1014.[1] Petitioner was sentenced to concurrent one-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-5a).

1. The indictment charged that petitioner submitted personal financial statements to federally-insured banks that failed to reveal his substantial loan liabilities. In addition, the indictment charged that petitioner's net worth was materially overstated in the financial statements (Pet. App. 2a).

The government's evidence at trial consisted of factual stipulations and exhibits, including the financial statements that petitioner presented to the banks.[2] Each financial statement purported to list petitioner's assets and included an item described as "Antioch Investments."[3] Each statement also purported to list petitioner's liabilities and his "net worth."

A comparison of petitioner's financial statements with the stipulated summary of his total liabilities showed that the financial statements omitted very substantial debts.

[1]Six additional counts alleging material misrepresentations to lending institutions were dismissed on the government's motion prior to trial.

[2]These exhibits and stipulations constituted the entire record in the district court.

[3]This item was referred to variously as "Antioch Investments and related interests carried at replacement or fair market value" and "Antioch Investments, a co-partnership, and related business interests, carried at cost and replacement" (Pet. App. 3a).



For example, in a financial statement submitted to the Amalgamated Trust and Savings Bank, petitioner reported total liabilities of $46,000. In fact, his liabilities then exceeded $7,500,000 (Tr. 72; GX 1-07; Gx. 20).[4] In addition, the financial statements that petitioner prepared for submission to various lending institutions reported greatly different liabilities. Thus, a statement submitted to the Bank of Jackson on November 11, 1973, reported an earlier $30,000 loan from that bank. However, a statement submitted on the same date to the Brown National Bank failed to disclose the $30,000 loan and also omitted a $57,000 loan from another bank. Instead, it included a $75,000 loan from the Brown National Bank that was not disclosed on the statement presented to the Bank of Jackson (GX 9-03, 4-05).[5]

During argument to the district court on the sufficiency of the stipulated evidence, petitioner's counsel admitted that the financial statements failed to disclose over $7 million in liabilities (Tr. 61-62). Thereafter, the trial judge entered a judgment of conviction, noting that, regardless of petitioner's net worth, the evidence clearly revealed a "pattern of undisclosed liabilities" (Pet. App. 18a).

2. The court of appeals affirmed. The court rejected petitioner's argument that the undisclosed liabilities were actually those of a partnership known as Antioch

[4]As the trial judge found (Pet. App. 17a-18a), petitioner failed to reveal equally large debts in the other financial statements that he presented to lending institutions.

[5]Similar inconsistencies appear in the statements petitioner prepared on April 15, 1973, for submission to different banks. Thus GX 2-02, 5-04, 6-06, 8-02, and 13-05 report his liabilities to be $46,500. However, GX 10-02 and 12-02, which omit a $30,000 loan reflected on the other April 15, 1973, financial statements, report petitioner's liabilities to be only $19,000.

Investments. The court held that "the notes were personal obligations of [petitioner] as to which he was primarily liable and as to which separate disclosure was required" (Pet. App. 4a). The court added that the fact that the proceeds of the loans were used for business purposes did not "convert the loans into liabilities of [the] business enterprise" (Pet. App. 3a-4a). Hence, petitioner's liabilities were "not adequately disclosed * * * merely [by] offset[ting] [them] against the assets of [Antioch Investments]" (*ibid.*). In light of petitioner's failure to truthfully reveal his liabilities, the court of appeals, like the district court, found it unnecessary to reach the question whether petitioner's convictions could be affirmed on the alternative theory that the financial statements misstated his net worth (Pet. App. 2a).

## ARGUMENT

1. Petitioner contends (Pet. 14-16) that the court of appeals affirmed his convictions on a theory different from the theory relied on by the district court. He asserts that, while the trial judge found that he misrepresented his net worth, the court of appeals affirmed on the theory that he failed to disclose the extent of his liabilities. There is no merit to this claim.

Although the indictment alleged that petitioner's financial statements were false because they failed to disclose his liabilities and, in the alternative, because he misstated his net worth, the trial judge did not reach the latter allegation.[6] Instead, the trial judge convicted petitioner because of the "pattern of undisclosed

[6]Although the indictment alleged two methods of violating the statute, proof of either one was sufficient to support petitioner's convictions. See, *e.g.*, *United States* v. *Ippolito*, 438 F. 2d 417, 419 (5th Cir.), cert. denied, 402 U.S. 953 (1971).



liabilities" that ran throughout his financial statements.[7] The decision of the court of appeals rests on the same basis. The court of appeals found that the financial statements failed to disclose substantial personal liabilities and, like the district court, found it unnecessary to consider the accuracy of petitioner's representations regarding his net worth (Pet. App. 3a).[8]

Nor is there merit to petitioner's related claim (Pet. 16-18) that the court of appeals recast the allegations of the indictment by treating Antioch's obligations as his personal debts. The indictment alleged that the liabilities in question were petitioner's liabilities, and, while the borrowed money may have been used in Antioch's

[7]The district court explained the basis for its judgment in the following words (Pet. App. 18a):

> Throughout all these exhibits you find a pattern of undisclosed liabilities. * * * [P]eople may argue about their net worth. Some people want to base it on the cost of production. Some may base it on market value of their assets. Some may base it on reasonable cost minus depreciation. And those items may fluctuate in the accounting field and the business world.
>
> But one thing does not fluctuate, and that's the value of your liabilities. They're firm. If you owe $7 million you owe $7 million, regardless of what happens to the valuation of your assets.
>
> And he failed to disclose those liabilities * * *.

[8]The fact that the proceeds of petitioner's undisclosed loans might have been used in Antioch's business operations does not alter their character as personal loans and does not affect petitioner's obligation to report truthfully the extent of his debts. Moreover, contrary to petitioner's assertion (Pet. 15), the government did not seek dismissal of four counts of the indictment because disclosure of Antioch's debts was equivalent to disclosure of petitioner's personal debts. Rather, the government sought dismissal of those counts because the financial statements in question revealed that petitioner had incurred additional unspecified personal indebtedness (see Govt. Trial

business operations, petitioner's counsel stipulated that the obligations were petitioner's personal liabilities (Tr. 63; Pet. App. 10a, 13a). It is irrelevant that Antioch, a partnership, may also have been liable to repay the debts in question. It is well established that a partner who incurs an obligation is not released from personal liability simply because the obligation is also chargeable to the partnership. See Wis. Stat. Ann. § 123.12 (West 1957) (adopting Uniform Partnership Act §15). Under these circumstances, the court of appeals was correct in concluding (Pet. App. 4a) that "there was sufficient evidence to prove beyond a reasonable doubt that the notes were personal obligations * * *."[9]

2. Petitioner also argues (Pet. 19) that, even assuming that he misrepresented his liabilities, it was improper to hold him to a precise standard of "accounting procedure." But petitioner was not convicted for engaging in imprecise accounting. Rather, he was convicted for repeatedly making materially false statements to lending institutions and doing so knowingly and intentionally (see Pet. App. 2a, 18a).

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Memorandum 4-5). The government did not press these charges in light of the many other financial statements that failed to make even this inadequate disclosure of petitioner's substantial personal indebtedness.

[9]Petitioner also argues (Pet. 19) that it makes no difference that he failed to report truthfully the extent of his debts so long as the "bottom line"—his "net worth"—was correctly stated. However, even if information about "net worth" were interchangeable with information about "indebtedness," that would not authorize petitioner to furnish false information about his indebtedness in a bank loan application. Moreover, petitioner's economic assumption is wholly erroneous. It matters a great deal to a lending bank whether the borrower has, on the one hand, assets that he values at $8 million and debts of $7.5 million, or, on the other hand, assets of $.5 million and insignificant debts. The leveraged position of the prospective borrower with $7.5 million in debts is highly significant, as is the fact that his apparent annual interest obligations exceed his "net worth."



In any event, it is beyond genuine doubt that petitioner acted with the intention to mislead the lending institutions. Not only did he repeatedly conceal over $7 million in personal liabilities, but he also filed totally inconsistent financial statements with different lending institutions at the same time. Those statements selectively revealed only the loan obligations that might be known to or discovered by the particular lending institution. See GX 20, 22; *United States* v. *Goberman*, 458 F. 2d 226, 228-229 (3d Cir. 1972). This pattern of nondisclosure and inconsistent reporting clearly established petitioner's fraudulent intent.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

## No. 79-1547

**D. DWAYNE SHAUFLER,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

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Respondent does not challenge the validity or the significance of the propositions of law argued within the Petition. Instead, the Respondent contends that the point is not properly presented by this case. In essence, the Respondent contends that there is no inconsistency between the appellate opinion and that rendered in the trial court. As Respondent views the record,

> "The court of appeals . . . like the district court, found it unnecessary to consider the accuracy of petitioner's representations concerning his net worth." (Resp. Br., at 5).

The Respondent errs in its reading of the record.

The district court found it *indispensable* to consider whether Petitioner's net worth had been misrepresented, and expressly held that Petitioner would have been acquitted if the government had not shown an overstatement of net worth:

> (Defense Counsel): It's not a crime not to list liabilities, Judge.
>
> The Court: It is when—
>
> (Defense Counsel): Only when it results in understating your net worth.
>
> The Court: That's correct. * * * (App. 13a)

* * *

At another point, the trial judge defined with precision the issue which he considered determinative:

> "(Petitioner) essentially falsified his net worth because he owed seven and a half million that he didn't say he owed. And the issue isn't what his net worth is. The issue is whether he falsified it. * * * (App. 11a)

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Respondent is likewise inaccurate in its statement that Petitioner claims in this Court "that the court of appeals recast the allegations of the indictment by treating Antioch's obligations as his personal debts." (Resp. Br., at 5) There was never any question but that Petitioner was liable, as a general partner, for the debts of the Antioch partnership. The court of appeals recast the



theory of guilt, by holding that Petitioner was guilty for a reason antithetical to that relied upon by the trial court.

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The argument made within Respondent's second point, and in its footnotes numbered 8 and 9 (Br. 6-7) seems contrary to reason, and is significantly different from the theories on which it relied in either of the courts below. It is hard to imagine that a banker would treat a $7.5 million "net" value of an active business enterprise as a representation that the business owned assets whose raw worth is $7.5 million, while owing not one penny of debt.

If any banker who received such a statement had desired further detail, he had only to ask. In the absence of any such inquiry, however, the conviction cannot be salvaged by resort to so unrealistic a rationale. The prosecution was required to prove unequivocal falsehood, not the possibility of a naive interpretation of literal truth. *United States v. Diogo*, 320 F.2d 898, 907 (2 Cir. 1963); *Cf. Bronston v. United States*, 409 U.S. 352 (1973).

Respectfully submitted,

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